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CURRENT DEVELOPMENTS

DISCOVERY OF DOCUMENTARY AND OTHER EVIDENCE IN A FOREIGN COUNTRY

There are substantial differences between attitudes in the United States and those in foreign jurisdictions towards litigation in general and pretrial discovery in particular. Thus, in the United States, there is a breadth of pretrial discovery that cannot be found in any other legal system. Moreover, factual investigation in the United States is largely controlled and conducted by the attorneys for the litigants rather than by the judiciary which, in many other legal systems, is responsible for such investigations in a litigated matter.

Thus, any American effort to discover evidence in a foreign country before trial meets at the outset attitudes and practices that are different from and often hostile to American attitudes and practices. These differences have an impact upon discovery abroad, as will appear later. Before considering this impact, however, it is helpful to present an overview of the devices through which the American practitioner may seek to secure evidence abroad.

Devices Available in the U.S. System for Discovery of Evidence Abroad

At the outset, it should be emphasized that the discovery devices most often used in U.S. litigation to secure evidence abroad are the rules of procedure of the court in question. Parties to the litigation use the applicable rules to force each other to give discovery of the scope and depth usual in American litigation. This approach has led to significant foreign responses—particularly blocking statutes. The sanctions for failure to comply with discovery demands appropriate under the court rules are sanctions imposed by the trial court; they may, in some instances, include the entry of judgment for the party that has been denied discovery.

Where, however, discovery from third parties not subject to the jurisdiction of the trial court is sought, the local discovery rules are generally not applicable and recourse must be had to international agreements. On the whole, however, such agreements play a role vastly less important than the court rules.

Multilateral Conventions. In 1964, before the United States was a party to any multilateral discovery convention, the Federal Rules of Civil Procedure were amended to provide foreign litigants, without any requirement of reciprocity, with wide federal assistance in obtaining evidence in the United States for use either here or abroad:[1]

> The amendments named the Department of State as a conduit for the receipt and transmission of letters of request. They authorized the use in the federal courts of evidence taken abroad in civil law countries, even if its form did not comply with the conventional formalities of our normal

[1] Rule 28(b); 28 U.S.C. §§1781 and 1782 were also amended.

rules of evidence. No country in the world has a more open and enlightened policy.[2]

A few years after these amendments, in October 1968, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was negotiated.[3] The Convention rests on the fundamental concept that it sought to find a method of gathering evidence "tolerable to the authorities of the State where it is taken and, at the same time, utilizable in the forum where the action will be tried."[4] The Convention entered into force for the United States on October 7, 1972.[5]

The Convention provides for three different methods of securing evidence abroad: (1) letters of request, (2) the use of consular agents, and (3) the use of commissioners. Since the purpose of this paper is not to examine the details of these mechanisms as such, they will not be discussed further here.

Although the Hague Convention has been available to litigants in American courts for more than a decade, there are relatively few significant judicial decisions dealing with the Convention. However, some issues of importance regarding its relation to local rules of civil procedure have been touched upon and are worthy of consideration.

First, it should be noted that Article 27 of the Convention provides that internal laws granting assistance to foreign courts upon terms more favorable than those contained in the Convention are preserved. Therefore, foreign litigants, whether or not of contracting parties, may avail themselves of more liberal federal and state provisions for obtaining evidence and are not restricted to the Convention.

What, however, is the position of an American litigant seeking evidence abroad? Should he be required to have prior resort to the Convention before using local discovery procedures? This question was considered by the Court of Appeals, First District, of California in *Volkswagenwerk A.G. v. Superior Court.*[6] In that case, Volkswagenwerk (VW) was properly joined as a defendant in a California action for bodily injuries and loss of consortium. Over its objection, the trial court had entered a discovery order pursuant to the local rules that would have required VW to permit inspection of its plant and documentary records, and to give other discovery, in Wolfsburg, West Germany. VW sought review of the trial court's order arguing, *inter alia,* that the discovery order encroached impermissibly upon the judicial sovereignty of West Germany. The court of appeals reversed the trial court. It looked at the federal cases and summarized their results as follows:

[2] Amram, *The Proposed Convention on the Taking of Evidence Abroad,* 55 A.B.A.J. 651 (1969).

[3] 23 UST 2555, TIAS No. 7444.

[4] *See* Report of the U.S. Delegation on the Convention, 8 ILM 804, 806 (1969).

[5] This is the only multilateral convention on this subject to which the United States is a party. It should be noted, however, that the United States has participated in the negotiation of the Inter-American Convention on Letters Rogatory, 14 ILM 328 (1975). This Convention and its Additional Protocol of 1980 were signed by the United States, but neither has yet been ratified. On the Protocol, see Trooboff, Current Developments Note, 73 AJIL 704 (1979).

[6] 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (App. 1982).

> Federal cases which have dealt with procedures tantamount to international discovery have generally recognized that what is required is a case-by-case process of balancing the interests of the respective sovereignties to reach an appropriate "accommodation of the principles of the law of the forum with the concepts of due process and international comity." (Cf., e.g., *In re Westinghouse Elec. Corp. Uranium, etc.* (10th Cir. 1977) 563 F.2d 992, 996–999; *Arthur Andersen & Co. v. Finesilver* (10th Cir. 1976) 546 F.2d 338, 341–342.) The same federal cases also generally affirm in the first instance the jurisdictional power of federal courts to order a party *to give discovery* in another country, and generally apply the "balancing approach" only when the responding party has failed to give full discovery and seeks to avoid *sanctions* by asserting the conflict of sovereign demands upon it. (*Ibid.*; cf. also *Societe Internationale v. Rogers* (1958) 357 U.S. 197, 211–212. . . .)[7]

After noting that it agreed with the approach of the federal cases, the court of appeals suggested that the "balancing approach" should be used initially rather than only after compliance with the discovery order has been refused. It concluded that "the trial court, in the exercise of judicial restraint based on international comity, should have declined to proceed other than under the Hague Convention at this stage."[8]

This is an interesting approach which, in terms of international comity and the spirit underlying the Hague Convention, has much to recommend it. The impact of this decision on the relation between local court rules and the Hague Convention has not yet fully emerged; the court's recommendation in the *Volkswagenwerk* case could be a significant departure.

The Californian courts did not, however, take into account an aspect of the Hague Convention that may checkmate the approach suggested in *Volkswagenwerk*. Article 23 of the Convention provides that a contracting state may declare in connection with its adherence to the Convention that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents as known in common law countries. With the exception of the United States, all contracting states, including West Germany, have made such declarations. In *Volkswagenwerk* the plaintiff was seeking pretrial discovery of documents located in West Germany. In view of West Germany's reservation under Article 23 of the Convention, therefore, a German court could have refused to execute a letter of request.

A second issue of significance is whether Articles 11 and 21 of the Convention, which permit a person to refuse to give evidence if it is prohibited by the law of the state of execution, have an effect upon discovery sought without the aid of the Convention. In *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*,[9] an American defendant sought an order pursuant to Rule 37(a) of the Federal Rules to compel a French plaintiff to produce documents located in France. The production of such documents was precluded by French

[7] 176 Cal. Rptr. at 884.

[8] *Id.* at 885. *Accord*, Pierburg GmbH & Co. KG v. Superior Court of Los Angeles County, 137 Cal. App. 3d 240, 186 Cal. Rptr. 876 (App. 1982).

[9] No. 81 Civ. 4463 (S.D.N.Y. Jan. 24, 1983).

law. The plaintiff argued that the court had "to decline to order the requested discovery" because of Articles 11 and 21 of the Convention.

Although both the United States and France had signed the Convention, the court rejected the argument because "nothing in the legislative history of the Hague Convention nor in the Congressional proceedings at the time of its adoption, suggests that Congress intended to replace, restrict, modify or repeal the Federal Rules."[10] The approach of the *Volkswagenwerk* case, of course, postpones consideration of this issue by its conclusion that international comity requires initial resort to the Convention.

A third question of interest is the effect of the Convention upon the application of the doctrine of *forum non conveniens.* At least one court has held that the existence of the Convention is not sufficient to tip the scales in favor of the United States court as a convenient forum. The United States Court of Appeals for the District of Columbia, in *Pain, et al. v. United Technologies Corp.*,[11] held that the trial court had correctly dismissed a consolidated wrongful death action brought by American, French, Norwegian, British and Canadian plaintiffs against the designer and manufacturer of a helicopter that crashed into the North Sea while en route from Bergen, Norway to an offshore drilling platform. The court, although recognizing that the Convention provides a compulsory system to obtain evidence abroad, emphasized that the numerous exceptions that can be raised by the requested state render that system "far from perfect," and it also noted the "exceedingly high" cost of obtaining evidence abroad. It concluded that the action should be dismissed upon the agreement of the defendant to waive the statute of limitations and concede liability with respect to any suit brought in a foreign country.

A federal district court used the Convention differently in *Hodson v. A. H. Robins Co., Inc., et al.*[12] In that case, English citizens sought to recover for injuries allegedly caused by an intrauterine contraceptive device manufactured by A. H. Robins Company, Inc. (Robins) in Virginia and inserted and removed by British physicians in the United Kingdom. Robins argued that plaintiffs' medical records and other evidence on the issues of causation and the extent of the plaintiffs' damages were located in England, beyond the subpoena power of the court. The court looked, in part, to the Hague Convention in denying Robins's motion:

> Furthermore, some of the necessary evidence located in the United Kingdom can be obtained through the channels of international judicial assistance available under the Hague Convention on the Taking of Evidence Abroad, to which the United States and the United Kingdom are signatories. The Convention provides for the use of a letter of request or letter rogatory to obtain evidence where the compulsory powers of a foreign court are needed. Of course, this system is less than perfect and will not completely replicate the access to evidence which would exist if all relevant material were located in this country, but does provide the parties to a trial here reasonable procedures by which to obtain evidence

[10] *Id.*, slip op. at 11.

[11] 637 F.2d 775 (D.C. Cir. 1980).

[12] 528 F.Supp. 809 (E.D. Va. 1981).

present in a foreign forum. Deficiencies would likewise exist if the situation were reversed, and the trials held in England.[13]

Bilateral Agreements. The United States has concluded a number of bilateral treaties for mutual assistance in the administration of justice involving investigation into certain specific matters, as, for example, the improper payments allegedly made overseas by the Boeing Company,[14] the Lockheed Aircraft Corporation,[15] and others.[16]

These agreements apply exclusively to investigations conducted by agencies with law enforcement responsibilities, in connection with criminal, civil or administrative proceedings to which such agencies are a party.[17] The obligation of the requested state to provide assistance to the requesting state is phrased in general terms—"the parties shall use their best efforts"—and includes supplying "information, such as statements, depositions, documents, business records, correspondence or other materials . . . concerning alleged illicit acts."[18] These agreements also usually provide that the parties shall use their best efforts to "assist in the expeditious execution of letters rogatory."[19] It should be noted that judicial assistance under these agreements is granted only if the actions to be taken by the requested state are not in violation of its domestic law.[20]

Finally, the Agreement between the United States and the Federal Republic of Germany, effected by Exchange of Notes, dated February 11, 1955, and January 13 and October 8, 1956, on Taking of Evidence (taking of testimony of German nationals by U.S. consular officers stationed in Germany) should be mentioned.[21] The Agreement, as confirmed in the Exchanges of Notes dated

[13] *Id.* at 820 (footnotes omitted).

[14] *See* the Agreements concluded with Canada, 28 UST 2463, TIAS No. 8567; Venezuela, 28 UST 5219, TIAS No. 8623; the Sudan, 28 UST 7482, TIAS No. 8723; Pakistan, 28 UST 7488, TIAS No. 8724; India, 28 UST 7497, TIAS No. 8726; and Nepal, 30 UST 2495, TIAS No. 9347.

[15] *See* the Agreements concluded with Japan, 27 UST 946, TIAS No. 8233; Nigeria, 27 UST 1054, TIAS No. 8243; Colombia, 27 UST 1059, TIAS No. 8244; the Netherlands, 27 UST 1064, TIAS No. 8245; Spain, 27 UST 3409, TIAS No. 8370; Turkey, 27 UST 3419, TIAS No. 8371; Australia, 27 UST 3424, TIAS No. 8372; the Federal Republic of Germany, 27 UST 3429, TIAS No. 8373; Italy, 27 UST 3437, TIAS No. 8374; Iran, 28 UST 5205, TIAS No. 8621; Belgium, 27 UST 1966, TIAS No. 8292; and Greece, 27 UST 2006, TIAS No. 8300.

[16] In connection with the General Tire & Rubber Co. and the Firestone Tire & Rubber Co. investigations, see the Agreement concluded with Mexico, 28 UST 2083, TIAS No. 8533; in connection with the Gulfstream American Corp. investigation, see the Agreement concluded with Togo, 30 UST 3477, TIAS No. 9401; in connection with the Jamaica Nutrition Holding Ltd. investigation, see the Agreement concluded with Jamaica, 30 UST 3868, TIAS No. 9430; in connection with the Westinghouse Electric Corp. investigation, see the Agreement concluded with Egypt, 30 UST 3996, TIAS No. 9441; and in connection with the McDonnell Douglas Corp. investigation, see the Agreement concluded with the Netherlands, 30 UST 2500, TIAS No. 9348.

[17] *See, e.g.,* Arts. 3 and 5 of the Agreements with Japan, note 15 *supra,* and Canada, note 14 *supra.*

[18] *See, e.g.,* Art. 2 of the Agreements with Japan and Canada.

[19] *See, e.g.,* Art. 7 of the Agreement with Japan and Art. 8 of the Agreement with Canada.

[20] *See, e.g.,* Art. 9 of the Agreement with Japan and Art. 10 of the Agreement with Canada.

[21] *See* TIAS No. 9938.

October 17, 1979, and February 1, 1980, is still considered in force even though the Hague Convention on the Taking of Evidence Abroad is now in force between the two countries.

Conclusion

The opinion of Lord Denning in *Smith Kline & French Laboratories Ltd. v. Block*[22] begins with this rather baroque metaphor: "As a moth is drawn to the light, so is a litigant drawn to the United States." Moths may sometimes be consumed by the light to which they are drawn and there is at least one hazard (particularly applicable to corporations and other business entities) that litigants face when they go to the United States. This hazard is created by the necessary submission of the foreign party to the American court's rules with respect to discovery. If the defendant seeks discovery of the plaintiff and the court enters an order compelling discovery, the plaintiff may be faced with the dilemma that to give discovery will offend the blocking statutes of its own state.

In *Societe Internationale v. Rogers,*[23] the U.S. Supreme Court held that, where a Swiss plaintiff did not comply with a discovery order on the ground that to do so would violate Swiss penal law, the complaint should not be dismissed because plaintiff had made a good faith effort to comply with the order.

After the *Rogers* case, the United States Court of Appeals for the Second Circuit, in a series of cases beginning with *First National City Bank v. Commissioner,*[24] held that a plaintiff should not be required to produce documents if to do so would violate the law of the state of the document's situs. The Second Circuit reaffirmed this position in a number of later decisions.[25]

Beginning in the mid-1970's, however, a contrary position was taken in other circuits. For example, in *United States v. Vetco,*[26] the Ninth Circuit, holding that the interests of the United States should prevail, affirmed an order of the district court requiring a defendant to produce documents located in Switzerland despite possible criminal liability under Swiss law.[27]

Thus, under some circumstances, the blocking statutes that other countries have enacted to curb American discovery may inhibit the efforts of parties to American litigation to prosecute or defend an action. There is no easy solution to this problem. It cannot be dealt with in terms of the Hague Convention because that Convention does not require the requested state to supply evidence where to do so would violate its domestic law.[28]

[22] Court of Appeal, May 13, 1982.

[23] 357 U.S. 197 (1958).

[24] 271 F.2d 616 (2d Cir. 1959).

[25] *See also* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); *In re* Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); and Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972).

[26] 644 F.2d 1326 (9th Cir. 1981).

[27] *See also* Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976); *In re* Uranium Antitrust Litigation, 480 F.Supp. 1138 (N.D. Ill. 1979); and Commission v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

[28] *See* Arts. 11 and 21 of the Convention, *supra* note 3.

One must reluctantly conclude that, from the United States point of view, the Hague Convention appears to have contributed little to the solution of the problem of discovery of documentary and other evidence in a foreign country. Although this conclusion is not surprising in view of the substantial differences between the U.S. attitude and the attitudes of other signatories to the Convention towards discovery, it does illustrate the limitations that domestic factors place upon the effectiveness of international agreements and the difficulty of establishing procedures to harmonize legal systems with conflicting views on the conduct of litigation.

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THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

During the 1970's human rights appeared to enjoy low esteem in Africa. The basic documents in inter-African relations were the UN and the OAU Charters. In its Preamble, as well as four substantive articles,[1] the UN Charter refers to respect for human rights as a basis for international relations. The principles of human rights were further elaborated in the Universal Declaration of Human Rights of 1948 whose principles, in the view of some writers, have become part of customary international law.[2] This Declaration was in turn elaborated on in the International Covenant on Economic, Social and Cultural Rights of 1966.

In its Preamble and purposes, the OAU Charter reaffirms the principles of the UN Charter and the Universal Declaration of Human Rights. It also refers to the right of self-determination, the eradication of colonialism, and the welfare and well-being of African people. The Organization of African Unity was concerned about the persistence of colonialism in the former Portuguese colonies of Mozambique and Angola and the unilateral declaration of independence by Southern Rhodesia under a racist minority regime. It gave material, moral, and diplomatic support to the liberation movements of those territories. It is committed to the achievement of human rights and self-determination by the people of South Africa and Namibia.

The OAU maintained an indifferent attitude to the suppression of human rights in a number of independent African states by unduly emphasizing the principle of noninterference in the internal affairs of member states at the expense of certain other principles, particularly the customary law principle of respect for human rights. President Sékou Touré's prohibitory assertion that

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[1] UN CHARTER arts. 1, 13, 55, and 76.

[2] Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 14 INT'L & COMP. L.Q., Supp. No. 11, at 1, 15 (1965); Bilder, *The Status of International Human Rights Law: An Overview*, in 1 INTERNATIONAL HUMAN RIGHTS IN LAW AND PRACTICE 8 (rev. ed. J. Tuttle 1978).